[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF TAXES (SOUTH AUSTRALIA) . . . . . APPELLANT;

AND

ROBERTSON . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1930.

ADELAIDE, *Sept.* 19, 22.

Gavan Duffy, Rich and Dixon JJ.

Income Tax (S.A.) —Deductions—"Implements, utensils, or articles" useless from wear and tear—Replacement—Plant—Motor-cars and horses—Construction of statute—Words of exception construed as recognizing a right—Taxation Act 1915 (*S.A.*) (*No.* 1200), *secs.* 22*, 26**—Taxation Act Further Amendment Act* 1923 (*S.A.*) (*No.* 1583), *secs.* 11, 13.

A company which carried on business as wholesale grocers and manufacturers claimed to deduct, in arriving at its taxable income, expenditure incurred in making replacements of (*inter alia*) lift-doors, bicycles, a billing machine, motor-cars and horses, all of which had been used for the purpose of the company's trade and had become useless through wear and tear.

Held, that no restricted meaning should be given to the phrase "implements, utensils, or articles" in sec. 26, sub-div. v., of the *Taxation Act* 1915 (S.A.) as amended by the *Taxation Act Further Amendment Act* 1923 (S.A.); that the

* The *Taxation Act* 1915 (S.A.), as amended by the *Taxation Act Further Amendment Act* 1923 (S.A.), provides (so far as material) in Part V. :—Sec. 22. "Subject to the other provisions of this Part, the taxable amount of the income of any taxpayer shall be ascertained as follows:— . . . x. The gross amount of the income having been ascertained, the net income shall be fixed by deducting all losses, outgoings, and expenses not being losses or outgoings of capital actually incurred by the taxpayer in the production of the income." Sec. 26. "In calculating the taxable amount of any income no deduction shall in any case be made in respect of" certain items; "Nor as regards any income derived from trade, shall any deduction be made in respect of the following items:— . . . v. The cost of the supply of any implements, utensils, or articles employed for the purposes of the trade, except those supplied in substitution of others which have become useless from wear and tear: vi. The . . . cost of repairs to or alterations of any premises not occupied for the purposes of the trade, or of any dwelling-house or domestic premises, except such part thereof as are occupied for the purposes of the trade."

things in question were, therefore, articles employed for the purposes of the trade; that the words of exception in sec. 26, sub-div. v., amounted to a distinct legislative recognition that such a deduction might be allowable, and, if they did not of themselves amount to an affirmative allowance of the deduction, at least prevented the words "not being losses or outgoings of capital" in sec. 22, sub-div. x., receiving an application which would exclude the cost of supply from the allowance, authorized by that provision, of expenses actually incurred in the production of income; and that the deductions claimed should be allowed.

Decision of the Supreme Court of South Australia (Full Court): *Robertson* v. *Commissioner of Taxes*, (1928) S.A.S.R. 313, affirmed.

APPEAL from the Supreme Court of South Australia.

D. & J. Fowler Ltd. was a company carrying on business as wholesale grocers and manufacturers, and John George Robertson was its public officer. In arriving at its taxable income for the twelve months which ended on 30th September 1924, the Company claimed to deduct expenditure incurred by it in making replacements of things which had been used in its business and had become useless from wear and tear. The things in question were steel lift-doors, steel scoops, shanks to tea funnels and scoops, machine belting, horses, motor-cars, a billing machine and adder, and bicycles. The Supreme Court of South Australia held that the cost of supplying the new lift-doors might be deducted as the cost of repairs to premises, and that the cost of the new articles replacing the other things mentioned might be deducted, but only to the amount of the original cost of the articles that had worn out less any moneys received or allowed in respect of the old things sold: *Robertson* v. *Commissioner of Taxes* (1).

The Commissioner of Taxes, by special leave, appealed to the High Court.

Cleland K.C. (with him *J. C. Martin*), for the appellant. The deduction is not authorized by the final words of sec. 26 (v.). These words merely make an exception from an express prohibition, and the general prohibition remains. The exception does not confer a power to deduct (*West Derby Union* v. *Metropolitan Life Assurance Society* (2)). The items in this case are not "implements, utensils,

(1) (1928) S.A.S.R. 313.

(2) (1897) A.C. 647, at p. 657.

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or articles" (*Hyam* v. *Commissioners of Inland Revenue* (1)). "Articles" is to a certain extent *ejusdem generis*. The items which it is permissible to charge against revenue are small articles which are consumed in use or during the year. The payments are losses or outgoings of capital within sec. 22 (x.). The money is spent to bring into existence an asset or advantage for the enduring benefit of the trade (*British Insulated Cables Ltd.* v. *Atherton* (2)). The items are plant, and plant is capital (*Forder* v. *Handyside* (3); *Coltness Iron Co.* v. *Black* (4)).

[DIXON J. Though plant is capital, periodic replacements of plant may be expenditure out of income.]

Mayo K.C. (with him *Astley*), for the respondent. Though the exception at the end of sec. 26 (v.) may not confer a right to deduct, it recognizes a right given by sec. 22 (x.). When the amending Act inserted the words "not being losses or outgoings of capital" in sec. 22 (x.), it did not insert "expenses." This may have been because of sec. 26 (v.) and (vi.). The items in question are not capital expenses but are properly payable out of income. The test is not "does the article become part of the Company's plant?" but "is there a proper debit item to be charged against income?" The whole of the plant of the industry must be looked at as one unit. Sec. 22 was amended to make clear what was probably already implicit (*Ounsworth* v. *Vickers Ltd.* (5)). As to the meaning of "implements, utensils, or articles," see *Caledonian Railway Co.* v. *Banks* (6); *Llandaff and Canton District Market Co.* v. *Lynden* (7)).

Cleland K.C., in reply.

Cur. adv. vult.

Sept. 22.

THE COURT delivered the following written judgment:—

The respondents are wholesale grocers and manufacturers. From their gross income derived from that business in South Australia during the twelve months ended 30th September 1924, they claimed

(1) (1929) 14 Tax Cas. 479.
(2) (1926) A.C. 205, at p. 212.
(3) (1876) 1 Ex. D. 233.
(4) (1881) 6 App. Cas. 315.
(5) (1915) 3 K.B. 267, at p. 273.
(6) (1880) 1 Tax Cas. 487.
(7) (1860) 30 L.J. M.C. 105.

to deduct, in arriving at their taxable income, the expenditure they incurred in making some replacements of things used in their business. They replaced two lift-doors which, by reason of wear and tear, had reached a condition of uselessness, two bicycles and a billing machine which had reached a like condition, and five motor-cars which, because of wear and tear, were no longer useful for the purpose for which they were required in the business. They also replaced five horses which had become so lame and disabled by reason of their work as to be useless.

The question for determination is whether this expenditure may be deducted under the provisions of the *Taxation Acts* 1915 to 1926 which are now repealed by the *Taxation Act* 1927. Sec. 22 of these enactments provides that, subject to the other provisions of Part V. of the Acts, the taxable amount of the income of the taxpayer shall be ascertained as follows:—" x. The gross amount of the income having been ascertained, the net income shall be fixed by deducting all losses, outgoings, and expenses not being losses or outgoings of capital actually incurred by the taxpayer in the production of the income." Sec. 26 (v.) provides that, in calculating the taxable amount of any income, no deduction shall be made in respect of " the cost of the supply of any implements, utensils, or articles employed for the purposes of the trade, except those supplied in substitution of others which have become useless from wear and tear." It is clear that what the taxpayers, respondents, claimed to deduct and, under the judgment of the Courts below, have been allowed to deduct, is the cost of the supply of things employed for the purposes of the trade in substitution of others, and under the terms upon which special leave was granted, the appellant, the Commissioner of Taxes, is precluded from disputing that the things thus replaced had become useless from wear and tear. It follows that, unless the things so supplied do not fall within the description " implements, utensils, or articles," they must come within the exception expressed in sec. 26 (v.). We see no reason to give a restricted meaning to the phrase " implements, utensils, or articles." It is true that the words come from what is now rule 3 (*d*) to Schedule D, Cases 1 and 2, of the *Income Tax Act* 1918 of Great Britain, and that, because by rule 6 a deduction is allowed for

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depreciation of plant, it may be proper to give the phrase a limited meaning in that statute. In the *Taxation Acts* 1915 to 1926 of South Australia, however, there is no provision expressly allowing a deduction for depreciation of plant, and we think that there is no reason for limiting the expression which is introduced into a very different context. We are, therefore, of opinion that the things mentioned are articles employed for the purposes of the trade supplied in substitution of others which have become useless through wear and tear. It is contended, however, by the Commissioner that the exception of the articles supplied in substitution for others which have become useless from wear and tear in sec. 26 (v.) does not affirmatively give to the taxpayer a right to a deduction because it neither expresses nor implies an intention to authorize the deduction of the cost of such supply. But it cannot be doubted that the exception amounts to a distinct legislative recognition that such a deduction may be allowable. This is explained, according to the the contention of the appellant, by the fact that sec. 22 (x.) originally contained no exclusion of losses or outgoings of capital and was therefore expressed in such a way as to authorize the deduction of all losses, outgoings and expenses actually incurred in the production of the income. It is said that, when the words " not being losses or outgoings of capital " were inserted in sec. 22 (x.), they operated to prevent the deduction of the cost of supplying implements, utensils or articles in substitution for others employed for the purposes of the trade, whenever that cost was a loss or outgoing of capital. But sec. 22 (x.) in the form which it assumed as a result of the amendment must be read together with sec. 26 (v.). Sec. 22 begins with the words " Subject to the other provisions of this Part," one of which is sec. 26 (v.). We think it is impossible to treat the recognition of the costs of substitution contained in sec. 26 (v.) as doing no more than keeping open the question whether such cost should be allowed under sec. 22 (x.). If it does not, in itself, amount to an affirmative allowance of this deduction, it at least prevents the words " not being losses or outgoings of capital " in sec. 22 (x.) receiving an application which would exclude this cost from the allowance, authorized by that provision, of expenses actually incurred in the production of income. The scheme of the Acts appears to

be to compare actual gross income with actual expenditure, and not to allow a deduction for depreciation. In such a scheme the replacement of plant progressively or periodically would naturally be considered a revenue item.

Another view which leads to the same result is that, in sec. 22 (x.) as amended, the omission of the word " expenses " from the exception of " losses or outgoings of capital " was not accidental, but was designed to leave unaffected the deduction of anything which may be properly considered an expense of conducting a business, as, for instance, the cost of supplying the articles we have described in substitution for those which have lost their usefulness. We do not find it necessary to discuss the question how far the phrase " losses or outgoings of capital " applies, if at all, to expenditure which would ordinarily be considered a proper deduction from profits in order to arrive at net income. While we express no dissent from the opinions expressed by the learned Chief Justice of South Australia and by *Napier* J. upon this subject, we think it is enough for the purposes of this case to say that the presence of the exception in sec. 26 (v.) is a clear indication that the words introduced into sec. 22 (x.) do not operate to prevent the deduction of the cost of the supply of implements, utensils or articles employed for the purpose of the trade, if supplied in substitution of others which have become useless by wear and tear.

For these reasons the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *A. J. Hannan*, Crown Solicitor for South Australia.

Solicitors for the respondent, *Magarey, Finlayson, Mayo & Astley.*

C. C. B.